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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

MARK SERTICH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Defendant is being prosecuted in violation of double jeopardy where he pled guilty, was sentenced and served a period of incarceration in a different federal jurisdiction for the same crime, and the government was not required to carry the burden of demonstrating that this second prosecution was for a separate crime.

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company or any other party to be listed.

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PETITION FOR WRIT OF CERTIORARI

PETITIONER, Mark Sertich, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix filed herewith ("App.") at 1A. The order denying rehearing is reproduced at 1B. The opinion of the district court in this case is reproduced at 1C.

STATEMENT OF JURISDICTION

On September 4, 1996, the United States Court of Appeals for the Seventh Circuit affirmed the district court's order denying Defendant's Motion to Dismiss for Violation of Double Jeopardy. A petition for rehearing and suggestion for rehearing in banc was filed on September 7, 1996. On September 30, 1996, the United States Court of Appeals for the Seventh Circuit denied Defendant's petition for rehearing.

The jurisdiction of this Court is involved under 28 U.S.C. 1254.

CONSTITUTIONAL AMENDMENT INVOLVED

The pertinent provision of the United States Constitution is the Fifth Amendment, which guarantees that

"No person shall be subject for the same offense to be twice put in jeopardy of life or limb".

STATEMENT OF THE CASE

In December, 1991, Mark Sertich pleaded guilty to conspiracy to evade federal excise tax pursuant to a plea agreement in the Central District of California. He was sentenced to 12 months in prison, a fine and probation. Sertich served his time, and was released in November of 1993.

On November 10, 1993, a week before the statute of limitations expired, Sertich was again indicted for conspiring to evade federal excise taxes, this time in the Northern District of Indiana.

Both the California and the Indiana indictments:

- charged conspiracy to evade federal excise tax;

- charged that the conspiracy began on a "date unknown" to the Grand Jury;

- charged that the Conspiracy operated in the place alleged "and elsewhere";

- charged Sertich and "others unknown";

- concerned conduct between Sertich and Richard Allen

Only the overt acts differed, with the California indictment alleging acts occurring in California in 1991, and the Indiana indictment alleging acts occurring in Indiana in 1987.

In 1985, Richard Allen was a resident of California and the officer and sole shareholder of his California company, Poly-Fuels, Inc. Poly-Fuels was one of many corporations which Allen owned or controlled, all of which were in the fuel industry. Allen had been employed in the fuel industry for more than 20 years.

In 1985, Sertich was a resident of Michigan, an officer and a shareholder in White Fuels, Inc., a Michigan corporation. Allen and Sertich had a business relationship in which they sold to, and purchased from each other, various fuel products, which were distributed in numerous places including Michigan, Indiana and Illinois. Invoicing by Poly-Fuels emanated from its home office in California.

Sertich and Allen utilized yearly "Exemption Certificates", which were registrations for transactions to purchase fuel "tax free". These certificates were purportedly not legitimate and gave rise to the subject indictments.

During 1986 and 1987, Allen became indebted to Sertich, the debt arising out of their fuel conspiracy.

In 1987, White Fuels' corporate offices were searched by State of Michigan treasury authorities seeking White Fuels' and Poly-Fuels' business records. In response, Sertich closed White Fuels and moved his customers, including Allen and Poly-Fuels, to Grubor Enterprises, Inc., which was operated by his brother in law. Allen signed a new Exemption Certificate for 1988 while a customer of Grubor Enterprises. Sertich and Allen continued their scheme through Grubor Enterprises.

In 1988, Allen signed a formal promissory note in Sertich's favor for the debt arising out of their 1986 and 1987 activity

In June of 1989, IRS special Agent Steven Tinsely, assigned to the Indiana post, subpoenaed White Fuels' seized records from the State of Michigan, indicating that the records were needed for a Grand Jury proceeding involving Federal and State tax crimes. Included in the seized records were White Fuels' invoices, which emanated from Michigan, and Poly-Fuels' invoices, which emanated from California.

In 1990, Sertich moved to Key West, Florida, and maintained a low profile. He and Allen stayed in regular contact and met with one another, and continued to pursue ventures to buy and sell fuel tax free, just as they had with White Fuels, Poly-Fuels and Grubor. In addition, Sertich continued to try to collect from Allen the debt from the earliest conspiratorial activity.

Eventually, Allen and Sertich agreed that Sertich would move to California and they would continue their business through Allen's recently acquired fuel storage and marketing facility in California. Sertich moved to California, and in 1990, Allen and Sertich agreed to bring in two Russian immigrants, Egyazarov and Slusker, to join the tax evasion scheme. Again, Allen signed an "Exemption Certificate," permitting the parties to buy fuel tax free.

Unknown to Sertich, in 1991, Allen had been confronted at gunpoint by the two Russian immigrants, scaring Allen such that he went to the police. Also unknown to Sertich, Allen became an informant for the IRS, and

began working with the IRS criminal investigators, both in Indiana and California.

In September of 1991, Allen signed a plea agreement in California, and it was telecopied to Indiana. The Plea Agreement covered both jurisdictions, and Allen agreed to cooperate with both jurisdictions.

In October of 1991, Sertich, the two Russian immigrants, and Allen were meeting in connection with the signing of yet another fuel tax exemption form. The "meeting" was interrupted when federal agents came in and arrested Sertich and the two Russian immigrants.

Sertich and the Russian immigrants were indicted by the Central District of California. Sertich pleaded guilty pursuant to a plea agreement in which "that office" agreed not to prosecute Sertich for "other offenses", and Sertich admitted to a $200,000 tax loss. The two Russian immigrants also pled guilty, but pled only to a $70,000 tax loss.

On January 3, 1992, Sertich's plea was accepted by the District Court in California and he was sentenced to serve a term of incarceration of 12 months.

On January 6, 1992, Indiana based IRS Special Agent Steven Tinsely wrote the following memorandum confirming that the California prosecutors had carved out room for Indiana to prosecute Sertich at a later date:

> "[California based IRS Special Agent Denita Jackson] advised me that Mark Sertich had signed the plea agreement and would fax a copy to me * * * . She related that the plea agreement specifically stated that no agreement had been made between the government and SERTICH

relating to any criminal charges which might be brought in the future."

Indiana authorities then hid in the weeds while SERTICH served his term of incarceration pursuant to the California Plea Agreement. Sertich had a release date of November, 1993.

In mid-November, 1993, IRS Special Agent Steven Tinsley went before a Special Grand Jury in Hammond, Indiana. He told the Grand Jury that he "began" his investigation of Sertich in June of 1992, and that he had interviewed Richard Allen.[1] He testified that he had determined that, from April of 1987 through November of 1987, White Fuels invoiced Poly-Fuels for fuel and that no tax was paid. He testified that Allen had applied for a Certificate to operate tax free, but that it had been denied by the IRS.

On November 10, 1993, Sertich was indicted by the Indiana grand jury for conspiracy to evade federal excise tax. This indictment alleged that, in 1987, Sertich had conspired in Indiana "and elsewhere", with other unnamed conspirators (including Richard Allen), to impede the IRS concerning fuel excise taxes. The overt acts charged a discrete little conspiracy occurring only between October 1986 and November 17, 1987.

Sertich filed a Motion to Dismiss for Double Jeopardy, asserting that the Indiana Indictment alleged the same offense for which he already had been convicted

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[1] Tinsley was the Indiana based agent who had, in 1989, subpoenaed White Fuels' and Poly-Fuels' records from the State of Michigan for his investigation of federal fuel crimes.

and punished in California, to wit: conspiring with Richard Allen and others to impede the treasury in connection with fuel excise taxes by use of Exemption Certificates.

Indiana federal authorities responded, asserting that the conspiracies were separate and distinct in time and method, and submitted seven documents, to wit:

(1) the California Indictment

(2) the Indiana Indictment

(3) the California Pre-sentence Report

(4) the California Plea Agreement

(5) the California Plea Hearing transcripts

(6) the Grand Jury Testimony of the California agent

(7) the Grand Jury Testimony of the Indiana agent.

A hearing was set. The District Court determined that Sertich had made his prima facie case supporting his claim of double jeopardy. The government had the burden of proof, but declined to call any witnesses and asserted that it would introduce no proofs other than the seven documents it filed with its answer. The government offered no proofs against Sertich's claim that he had already been punished for the same offense. Sertich moved for dismissal based on the failure of the United States to meet its burden of proof. The motion was denied.

Sertich put on a "rebuttal", and introduced testimony and documents that the conspiracy had existed well beyond 1987, that overt acts had occurred in California,

Michigan, and other states, and that he and Allen had pursued business opportunities in which to continue the fuel tax evasion scheme throughout the period 1987 throughout 1991. Despite hiatuses, despite the addition of new conspirators, and despite the moves about the country, Sertich alleged that it was one over-arching conspiracy, all-dependent upon Richard Allen's knowledge of the fuel business.

On February 9, 1995, the District Court issued its Opinion and Order denying Sertich's claim of double jeopardy. Sertich appealed to the Court of Appeals for the Seventh Circuit, asserting that the Indiana indictment violated two protections – a second prosecution for the same offense after conviction, and multiple punishments for the same offense.

Sertich argued that the crime, the participants, and the overall method, spanned over time and distance, was in fact a single over-arching conspiracy. Sertich argued that Indiana and California prosecutors had worked together, and had carefully crafted the indictments to make it look like there were two, instead of one, conspiracies. Sertich argued that, because the government had superior access to the proofs, it was critical that the court correctly apply two well-recognized rules of law: the *presumption that a conspiracy is deemed to be a single conspiracy;* second, the rule that *the burden of proving the existence of two separate and distinct conspiracies was on the government.* Sertich carefully pointed out that because of the burden of proof issue, the Court was required to determine *"whether the government met its burden based on the pre-evidentiary hearing filings* by the United States".

The Seventh Circuit essentially determined that Sertich did not prove that it was one over-arching conspiracy rather than two discrete conspiracies. The court held that overt acts in furtherance of the Indiana conspiracy were not proven to have taken place in California. The Court also held that the lapses in time between overt acts, and the differing methods utilized to accomplish the evasion, pointed "just as much" to a new conspiracy as to continuation of the old conspiracy. As to Sertich's claims that he had already been punished for the tax loss arising out of the Indiana portion of the conspiracy, the Seventh Circuit held that Sertich had "never raised this argument until his reply brief", and therefore had waived it.

Sertich has not been tried on the Indiana charges. Richard Allen, who in 1991 signed a plea agreement acknowledging his guilt in an over-arching fuel evasion scheme, agreed to cooperate with both Indiana and California federal authorities. His sentencing has been held in abeyance, pending his testimony at Sertich's proposed trial in Indiana.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because this court has not, but should have decided, the specific tests and burdens of proof in determining one of the most important questions of federal and constitutional law: is this defendant being twice prosecuted for the same crime?

The proscription against double jeopardy arises from the Fifth Amendment to the United States Constitution, which declares that no person shall "be subject for the

same offense to be twice put in jeopardy of life or limb". This provision has long been considered a guarantee " . . . that the [government] *with all its resources and power* [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Green v. United States*, 355 U.S. 184, 187 (1957). This Country has a firm commitment to the fundamental guarantee against double jeopardy, as it is deeply rooted in common law heritage. As articulated by the Supreme Court:

> "[if] there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Ex parte Lang*, 85 U.S. 163, 168 (1874).

A long time ago, this Court determined that the prosecution of a single conspiracy as two separate conspiracies violates a defendant's double jeopardy guarantee, *Braverman v. United States*, 317 U.S. 49, 53 (1942). A number of tests for determining whether two indictments charge the "same offense" have evolved through this Court's direction, i.e., "same evidence" test, *Gavieres v. United States*, 220 U.S. 338 (1911); "same transaction" test, *Ashe v. Swenson*, 397 U.S. 436 (1970); "same conduct" test, *Grady v. Corbin*, 110 S.Ct. 2084 (1990). But conspiracy cases are more involved. Most circuits use the "totality of the circumstances" test for determining whether there is one or a series of conspiracies, *United States v. Reiter*, 848 F.2d 336, 340 (2nd Cir. 1988); *United States v. Ciancaglini*, 858 F.2d 923, 927 (3rd Cir. 1988), *United States v. Macdougall*, 790 F.2d 1135, 1144 (4th Cir. 1986); *United States v.*

Jabara, 644 F.2d 574 (6th Cir. 1981); *United States v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980); *United States v. Darden*, 70 F.2d 1507, 1518 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 1449 (1996); *United States v. Sasser*, 974 F.2d 1544, 1550 (10th Cir. 1992), *cert. denied*, 506 U.S. 1085 (1993).

The totality of circumstances test requires the court to look at five or six factors: Do both indictments involve the same overt acts? The same people? Places? Time period? Objectives/modus operandi? Do the two conspiracies depend upon each other for success? If several of the factors are the same, then it follows that there was only one, not two, conspiracies. *United States v. Kalish*, id., *United States v. Castro*, id., *United States v. Jabara*, id.

The problem is that prosecutors, using all their resources and power to communicate and share with other jurisdictions, have become more and more adept at shaping indictments so that more than one jurisdiction can prosecute a singular conspiracy which happens to touch both turfs. And courts continue to struggle with the not easy task of determining whether there is a single conspiracy being divided into two, or a series of small discrete conspiracies.

Because of the firm commitment to this fundamental guarantee, it has repeatedly been held, but never confirmed by this Court, that it is the *government's burden to prove by a preponderance of the evidence, prior to trial, that the indictments charge different crimes. United States v. Stricklin*, 591 F.2d 1112, 1117 (5th Cir.), *cert. denied*, 444 U.S. 963, 100 S.Ct. 449 (1979); *United States v. Kalish*, 690 F.2d 1144, 1152 (5th Cir. 1982). A number of the cases have spelled out two overriding reasons why the burden

should be on the government; first, because the government has superior access to the proofs, *United States v. Jabara*, 644 F.2d 574 (6th Cir. 1981) and second, because the government can shape the overt acts charged in each indictment . . . under the guise of prosecutorial discretion", *United States v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980).

In Sertich's case, the Seventh Circuit essentially determined that *Sertich had not proved* that it was one rather than two conspiracies. The Court based its decision on its determination that there was a two year hiatus, and different methods for carrying out the scheme, holding that those factors "point just as much" to a new scheme as to a continuation of the old scheme. Had the Court properly applied the burden of proof to the government, proofs "pointing just as much" to one conspiracy as two was a factor which clearly should have weighed against the *government*, not against Sertich. The party with the burden of proof is supposed to fail if the proofs are equal.

The Court further reasoned that because Sertich's role in Indiana was different than in California (employee vs. decision maker), and because "neither the indictments *nor Sertich* provided any evidence that any overt acts in furtherance of the Indiana conspiracy took place in California", there was insufficient proof that it was merely one conspiracy. Again, it was not properly Sertich's burden of proof. As such, these factors should have weighed against the *government*, not against Sertich.

As to Sertich's claim that the government intentionally crafted the indictment to make one conspiracy look like two, the Seventh Circuit held:

> "There is nothing wrong with the government's efforts to avoid overlapping charges and evidence that could raise a claim for double jeopardy. The prosecutors were no doubt aware of the possibility of such a challenge given the fact that Sertich and Allen were involved in each operation."

This statement, of course, flies directly in the face of this Court's determining in *Green v. United States, supra,* that the government "with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual . . . ".

As to Sertich's claims that he had already been punished for the Indiana conspiracy, the Court determined that "it could be true, we are not in a position to know" whether the federal district court in California sentenced Sertich based on a tax loss that included both the California and Indiana tax schemes. The Court determined that Sertich "never raised this argument until his reply brief" and that he therefore forfeited it on appeal. Yet in fact, Sertich had raised the argument; he just hadn't presented any proofs because they were not within his arsenal of proofs and the burden of proof was supposed to be on the government. Moreover, this is a good example of a situation in which government had better access to the proofs (i.e., was Sertich sentenced in California on a tax loss that included the losses from Indiana? He pleaded guilty to a tax loss of $200,000, and the two Russian immigrants pleaded guilty to a tax loss of $70,000. Who better than federal authorities in Indiana to prove that it never gave

California tax loss information from the Indiana conspiracy?). Again, the lack of proofs on this factor should go against the *government*, not Sertich.

The lower courts have used a hodgepodge of conflicting principles and standards to reach contradictory conclusions as to whether there were one or two conspiracies. For example, contrary to the Seventh Circuit's ruling in Sertich's case, courts have found prosecutions to violate double jeopardy under a wide-range of circumstances, i.e., even if some of the named co-conspirators are different, *United States v. Mallah*, 503 F.2d 971 (2nd Cir. 1974), *cert. denied*, 410 U.S. 995 (1975), and even if the indictments allege different overt acts, *Short v. United States*, 91 F.2d 614 (4th Cir. 1937), even if the overt acts occurred at different times and locations, *United States v. Kalish*, 690 F.2d 1144 (5th Cir. 1982), even if it was suspended and then continued, *United States v. Lash*, 937 F.2d 1077 (6th Cir. 1991), even it was delayed in operation, *United States v. Heckman*, 479 F.2d 726 (3rd Cir. 1973), and even when the agreement contemplates a multiplicity of means or methods, *United States v. DeLillo*, 602 F.2d 929, 948 (2nd Cir.), *cert. denied*, 449 U.S. 835 (1980), even if there is a change in membership, or a hiatus, *United States v. Cambindo Valencia*, 619 F.2d 603, 625 (2nd Cir. 1979); and even if various players move onstage and off, a mere shuffling of personnel is not enough to support a finding that there were multiple conspiracies, finding that parties can leave or join a conspiracy without terminating the overall conspiracy, *United States v. Curry*, 977 F.2d 1042, 1053 (7th Cir. 1992). Yet the Court in Sertich's case determined essentially to the contrary of these cases: i.e., that there was no double jeopardy because the indictments

alleged different overt acts, the overt acts occurred at different times and locations, the conduct was suspended, there was a multiplicity of means, and the players had different roles. Particularly disturbing is the court's finding that *"there is nothing wrong with the government's efforts to avoid overlapping charges and evidence that could raise a claim for double jeopardy"*.

There *is* something wrong with the government engaging in efforts to avoid overlapping charges, and other circuits have clearly recognized that fact when they determined that the burden of proof rested on the government specifically because the government had the ability to engage in efforts to "shape overt acts" . . . "under the guise of prosecutorial discretion". *United States v. Castro, supra.*

Because the government does have the ability to shape overt acts, and divide one conspiracy among two jurisdictional "turfs", correctly assigning, defining, and applying the burden of proof to the government is critical. Many circuits have recognized this fact, *Stricklin*, supra, *Jabara*, supra, *Kalish*, supra, but this Court has not established a definitive rule or provided guidance.

The decision by the United States Court of Appeals for the Seventh Circuit demonstrates the danger of not strictly imposing the burden of proof on the government. The Seventh Circuit has veered away from this Court's pronouncements about the importance of the guarantees against double jeopardy, and issued a ruling based on an application of a burden of proof that effectively insulates dual prosecutions, even when prosecutors engage in concerted efforts to shape indictments so that it appears that

there was one instead of two conspiracies. The Seventh Circuit's failure to actually impose the burden of proof on the government resulted in an incorrect decision and a wholly inappropriate treatment of what is, after all, a constitutional guarantee of the highest importance.

This Court should not let the protections against double jeopardy suffer based simply on the ease with which two jurisdictions can dissect one conspiracy touching both turfs so that each can prosecute and punish. Only by clarifying the tests and defining and assigning the burden of proof, can this court promote the protection against double jeopardy.

CONCLUSION

For the reasons stated, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

In the

UNITED STATES COURT OF APPEALS

for the Seventh Circuit

No. 95-1471

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARK G. SERTICH,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 93 CR 138 – **Rudy Lozano**, *Judge.*

ARGUED MARCH 29, 1996 – DECIDED SEPTEMBER, 4, 1996

Before CUMMINGS, MANION, and EVANS, *Circuit Judges.*

MANION, Circuit Judge. On December 23, 1991, Mark Sertich pleaded guilty to conspiracy to evade federal excise tax pursuant to a plea agreement in the Central District of California. He was sentenced to 12 months in prison, a fine, and probation. On November 10, 1993, a week before the relevant statute of limitations expired, Sertich was indicted in the Northern District of Indiana for conspiring to evade federal excise taxes in a conspiracy that predated the California conspiracy. Sertich

moved to dismiss the indictment on the grounds it violated his fifth amendment right against double jeopardy, arguing that both charges stemmed from the same conspiracy to which he had already pleaded guilty and been sentenced. The district court found that the two conspiracies were separate, involved different schemes, separate people, separate time periods, and separate locations and denied Sertich's motion. We affirm.

I.

The following facts are undisputed. Mark Sertich entered a plea agreement with the United States Attorney's Office for the Central District of California. He pleaded guilty to an indictment charging him with a single count of violating 18 U.S.C. § 371 (conspiracy to commit excise tax evasion). In doing so, Sertich admitted to participating in a "daisy chain" scheme to evade payment of federal excise taxes on diesel fuel. The indictment detailed such a scheme: one diesel fuel wholesale distributer (Company A) uses a legitimate IRS Form 637 registration for tax-free transactions to purchase fuel "tax free" from a legitimate refinery or another distributer holding an IRS Form 637. Company A then "sells" the fuel tax free to another company holding a fraudulently obtained Form 637 (Company B). Typically, Company B never takes physical possession of the fuel which, rather, is sold "tax paid" or "tax included" to legitimate diesel fuel retailers. Company B is a shell company which pockets rather than pays the excise taxes. When the IRS closes in on Company B, those involved simply disappear because Company B exists only on paper. Company B is typically referred to as a "burn" or "bust out" company.

The indictment charged that "[b]eginning on a date unknown to the Grand Jury and continuing to on or about October 11, 1991, within the Central District of California and elsewhere," Sertich along with Abram Egyazarov, Eugene Slusker, and Samuel Lehtzer, and others known (one of whom was later identified as Richard Allen) and unknown, conspired to defraud the United States by evading "federal diesel fuel excise taxes." The indictment charged that the daisy chain scheme used a petroleum wholesaler, Boland Petroleum, Inc., to purchase diesel fuel tax free (in the role of Company A above) and sell that fuel to a shell company set up by the conspirators. Sertich admitted to concealing the scheme by creating and maintaining false records. The indictment charged overt acts, all occurring in California between July 15, 1991, and October 11, 1991.

The agreement under which Sertich pleaded guilty contained sentencing stipulations and an agreement that "this office" would not prosecute Sertich for "other offenses connected with the activities charged in the indictment, specifically, with respect to activities involving Richard Allen from approximately August 24, 1990 through October 11, 1991 within the jurisdiction of the Central District of California." The district court for the Central District of California accepted Sertich's plea of guilty and sentenced him to 12 months imprisonment, fined him six thousand dollars, and placed him on three years probation.

On November 10, 1993, one week before the statute of limitations would have run, a federal grand jury sitting in the Northern District of Indiana indicted Sertich on a

charge of violating 18 U.S.C. § 371. The Indiana indictment charges that beginning "in or about October, 1986, through on or about November 17, 1987, in the Northern District of Indiana and elsewhere," Sertich conspired to defraud the United States by evading the collection of "federal motor fuel excise taxes." The indictment further charged that in April of 1987, Sertich met with a co-conspirator (later identified as Richard Allen) regarding a delinquent debt owed by Allen to Sertich. At the time, Allen owned and operated a company called Poly-Fuels, Inc. and Sertich owned and operated White Fuels, Inc. The two formed a plan to profit from exchanging diesel fuel for gasoline and illegally manipulating the federal and state motor fuel tax on each. Poly-Fuels subsequently "delivered tanker loads of diesel fuel to White Fuels in Detroit, Michigan, and returned to Chicago, Illinois, and Northwest Indiana with tanker loads of gasoline from White Fuels." According to the indictment, from April through November, 1987, White Fuels invoiced Poly-Fuels for 3,356,404 gallons of gasoline with federal excise tax excluded, but delivered only 2,485,148 gallons. From July through October, 1987, White Fuels purchased 884,693 gallons of diesel fuel from Poly-Fuels and included 15.1 cents per gallon excise tax in the price. Sertich never paid the federal excise taxes; they were included on the invoice so that White Fuels could take a credit on its federal excise tax returns for the payments. While perhaps confusing, the indictment charges, and the government presumably is convinced it can prove, that the scheme netted Sertich and his co-conspirators approximately $346,000 in evaded motor fuel excise taxes from April to November 17, 1987.

The government has yet to prove any of these Indiana charges. Sertich challenged the second indictment through a motion to dismiss for violation of double jeopardy in the Northern District of Indiana and a motion to enforce the nonprosecution paragraph of the plea agreement in the Central District of California. Each district court denied Sertich's motion. He appealed both. The United States Court of Appeals for the Ninth Circuit affirmed the Central District's denial of his California motion. *United States v. Sertich*, 69 F.3d 545 (table), 1995 WL 623745 (9th Cir. 1995). We review the Northern District's denial of his Indiana motion. This is a legal question which we review *de novo*. *United States v. Furlett*, 974 F.2d 839, 842 (7th Cir. 1992).

II.

When a district court denies a defendant's pretrial motion challenging an indictment on double jeopardy grounds, the denial is immediately appealable as a "final order." *Abney v. United States*, 431 U.S. 651, 662 (1977). Sertich has advanced two arguments supporting his double jeopardy claim. First he argues, broadly, that he was involved with Allen (the unnamed conspirator common to both indictments) in one extended conspiracy to evade federal fuel excise taxes and that after pleading guilty to that conspiracy in California, the United States may not divide the one conspiracy into two and prosecute him again in Indiana. Second, he argues the sentence he received for his California guilty verdict was longer than the sentences received by the other California conspirators because his sentence was based on tax losses that

included the losses from the Indiana conspiracy as well as the California conspiracy.

A.

Sertich's primary argument is that the federal prosecutors in Indiana and California carefully divided a single conspiracy into two. To support this position, Sertich argues that he and Allen were primary players in both schemes. Irrespective of the methods employed, the conspiracy's objective was to make money through fuel excise tax fraud and its purpose was to pay off a preexisting business debt Allen owed to Sertich. Sertich argues that rather than two discrete criminal enterprises, the Indiana conspiracy continued straight through and into the California conspiracy. Even when he and Allen were not actually running a fuel excise tax evasion scheme (in Indiana) they were plotting their next (in California) through a series of meetings that covered what might otherwise appear to be the two-year hiatus between November 1987 when the Indiana operation shut down and late 1990 when he joined Allen's new California company. Sertich argues further that each indictment charged the same statutory offense, conspiracy to evade federal fuel excise taxes. Both indictments charge conspiracies involving other persons, places, and dates "unknown," acknowledging that each was more extensive than specified by the overt acts. Finally, Sertich argues the federal investigation carefully crafted the evidence before the grand juries, and carefully worded the indictments and plea agreement so as to improperly suggest the existence of two conspiracies.

The prosecution of a single conspiracy as two separate conspiracies violates a defendant's right not to twice be tried for the same offense. *Braverman v. United States*, 317 U.S. 49, 52-54 (1942); *United States v. Dortch*, 5 F.3d 1056, 1061 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1077 (1994). A defendant claiming that a second prosecution subjects him to double jeopardy "bears the burden of establishing that both prosecutions are for the same offense." *United States v. Chiattello*, 804 F.2d 415, 418 (1986). The defendant must set out a prima facie case that the second indictment charges the same offense for which he has already been convicted. The burden then shifts to the government to demonstrate that the indictments are for separate offenses. *Dortch*, 5 F.3d at 1060. *United States v. Stricklin*, 591 F.2d 1112, 1117-18 (5th Cir.), *cert. denied*, 444 U.S. 963 (1979). The government must prove by a preponderance of the evidence that the two indictments charge different crimes. *United States v. Kalish*, 690 F.2d 1144, 1152 (5th Cir. 1982), *cert. denied*, 459 U.S. 1108 (1983); *cf. United States v. Verrusio*, 803 F.2d 885, 895 (7th Cir. 1986) (citing *Kalish*; equating government's burden in breach of plea challenge to that in double jeopardy challenge, i.e., preponderance of the evidence). In this case, the district court ruled that Sertich had met his burden of alleging a prima facie case of double jeopardy. We need not address the sufficiency of the prima facie case where, as here, the district court has determined that based on a preponderance of the evidence, evidence submitted by both the defendant as well as the government, the indictments cover distinct conspiracies. Instead, we review the court's ruling based on all the evidence available to it to

determine, *de novo*, whether the preponderance of the evidence points to two conspiracies or only one.

Traditionally we determine whether two indictments are for the same offense by considering whether the same evidence required to prove one would have been sufficient to prove the other. But conspiracy cases are more involved. *United States v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980); *Dortch*, 5 F.3d at 1061. To determine whether the two charges arise out of one conspiracy, the court must look to such factors as whether they involve the same overt acts, people, places, or time period; whether they share similar objectives or modus operandi; or whether the two conspiracies depend upon each other for success. *Dortch*, 5 F.3d at 461, *United States v. Thornton*, 972 F.2d 764 (7th Cir. 1992), *Chiattello*, 804 F.2d at 418, *Castro*, 629 F.2d at 461. While we have stated that "[w]here several of these factors are present, the conclusion follows that the alleged illegal combinations are not separate and distinct offenses," *Castro*, 629 F.2d at 461, we have also held that some factors are at times more telling than others. See *Chiattello*, 804 F.2d at 419 (same statutory offense and same time period "far from sufficient" to establish one conspiracy), *Dortch*, 5 F.3d at 1062 ("we do not find the alleged time overlap particularly significant"), and 1063 (fact that two indictments charged same statutory offense "weakest evidence" in support of argument). As a result we do not just tabulate similarities or dissimilarities, rather we look to how extensive is the overlap. *Dortch*, 5 F.3d at 1062. The test is ultimately one of "totality of the circumstances."[1]

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[1] Many of the circuits examining what we in *Castro* and other cases have described as "factors" to consider have

An overlap or proximity in time frame may at times be relevant to a determination of whether one or two conspiracies exist, however we have also held that in some instances two separate conspiracies can occur simultaneously. *Chiattello*, 804 F.2d at 419. Here two years separated the two criminal enterprises. While we do not disregard Sertich's evidence that he and Allen conversed and met during this time frame, Sertich has described a personal friendship as well as a business association. Such meetings are therefore not in themselves particularly probative. Even if they did discuss another criminal excise tax avoidance scheme, however, the break in time between the two schemes coupled with the entirely different methods the Indiana and California enterprises employed for evading taxes points just as much to a discussion of a new scheme as to a continuation of the old scheme. Even if the California conspiracy had employed the same method as that in Indiana (which it did not), that fact would not insulate Sertich. His argument suggests that an indictment for conspiring to engage in one particular crime insulates a defendant from indictment

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described the test as one of "totality of the circumstances." *See, e.g. United States v. Reiter*, 848 F.2d 336, 340 (2d Cir. 1988); *United States v. Ciancaglini*, 858 F.2d 923, 927 (3d Cir. 1988); *United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986); *In re Grand Jury Proceedings*, 797 F.2d 1377, 1380 (6th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *United States v. Darden*, 70 F.3d 1507, 1518 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 1449 (1996); *United States v. Sasser*, 974 F.2d 1544, 1550 (10th Cir. 1992), *cert. denied*, 506 U.S. 1085 (1993). We have gone so far as to equate our "factor" test with the totality of the circumstances test in *Ciancaglini*. *United States v. Marren*, 890 F.2d 924, 935 (7th Cir. 1989). Whatever the label, the tests are one and the same.

for additional conspiracies to commit the same crime. This argument defies common sense, for a criminal successful with one crime would seem likely to repeat it rather than to undertake an entirely new and unfamiliar enterprise. More significantly, the case law has rejected the same theory. "[T]he guarantee against double jeopardy does not insulate a criminal from punishment for subsequent offenses merely because he chooses to continue committing the same type of crime." *Dortch*, 5 F.3d at 1063, quoting *United States v. West*, 670 F.2d 675, 681 (7th Cir.), *cert. denied*, 457 U.S. 1139 (1982). To hold otherwise would reward those who could most broadly describe the objective of their criminal endeavors. Broadly defined conspiratorial objectives thus do not control our determination.

The same holds true for the underlying "purpose" of the conspiracies alleged by Sertich: to pay off a debt owed to Sertich by Allen. Sertich argues the debt means the first conspiracy never "divided the spoils." While the debt provides a motive for Allen's participation it provides little insight into whether the conspiracies were actually one. Allen was paying off his debt by permitting Sertich to make money off him. The first venture's proceeds were credited towards Allen's debt. There was no loot left to divide – the characteristic of the usual "divide the spoils case." Further, the debt was preexisting and unrelated to either charged conspiracy. Had Allen and Sertich also conspired to rob a bank or sell narcotics, the existence of the debt would provide scant evidence that the conspiracies were actually related. A criminal, after all, can engage in many conspiracies where his underlying motive is to "make money," whatever the use to

which he may ultimately plan to put that money. That broad motive does not define the relationship between the conspiracies.

The record evidence indicates the Indiana conspiracy involved Sertich and Allen as the primary players, operating a scheme in which their wholly owned firms, Poly-Fuels, Inc. (Allen) and White Fuels, Inc. (Sertich), swapped fuel and falsified tax documentation, relying on the lack of cooperation between taxing authorities in Indiana, Illinois, and Michigan to evade excise taxes and thus generate additional net revenue. The operation came to a halt in November 1987 when the authorities raided and searched White Fuels. Sertich did not join Allen's new California company, Mark Diamond, Inc., until late 1990. In the interim, Sertich worked as a salaried employee for his brother-in-law's Michigan fuel company, Gruber Enterprises, until May or June of 1988, and as a construction manager in Florida from the spring of 1990 through August of the same year. Thus, during the two years that separated the two criminal enterprises Sertich engaged in business activities unrelated to Allen, to tax avoidance schemes, or, in the case of the Florida job, to the fuel business altogether.

Sertich and Allen were the primary conspirators in Indiana involving a scheme for swaps between two legitimate fuel companies they each owned. In California, however, they worked for Egyazarov (who by May of 1991 had taken over Mark Diamond, Ltd., from Allen[2]).

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[2] In May of 1991 Allen was forced at gunpoint to sign Mark Diamond over to Egyazarov, who along with Slusker ran the

Sertich thereafter aided Egyazarov in the purchase and illegal operation of Boland Petroleum. Sertich was not a major player or decisionmaker in California. Rather, he admitted to simply being in charge of the paperwork necessary for setting up the "burn" companies and "selling" fuel tax-free to those companies. This role was quite different from the one he had in the Indiana conspiracy.

Although both indictments contained the boilerplate language "and elsewhere," there is no evidence whatsoever that any overt acts, much less those charged in each indictment, took place outside the states specified. The California conspiracy involved actions taking place solely within California. The Indiana conspiracy involved swaps of fuel between, and tax avoidance in, Indiana, Michigan, and Illinois. While White Fuels was a California company, and Allen a California resident, neither the indictments nor Sertich provide any evidence that any overt acts in furtherance of the Indiana conspiracy took place in California. Thus, there is no overlap in location between the two conspiracies.

Finally, perhaps the most important factor in distinguishing between the existence of one or more than one conspiracy is whether the two conspiracies depend on each other for their success. *Dortch*, 5 F.3d at 1063. Here they did not. Neither conspiracy had anything to do with

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company thereafter as Mark Investments, Inc. Allen became an involuntary "employee" of his own firm. Sertich continued to work for the new "owners." After he was physically beaten by Slusker and Egyazarov, Allen went to the police and became an informant, precipitating the eventual arrest of Sertich and the others.

the other. Each stood on its own in time, place, and method. Each operation could have taken place, and in fact did take place, independently of the other, and each operation's success or failure was independent of the other's.

Based on the totality of the circumstances in this case, the evidence demonstrates by a preponderance of the evidence two distinct conspiracies rather than one overarching conspiracy. Sertich's claim that the government carefully crafted the indictment and the evidence to make one conspiracy look like two is unfounded. There is nothing wrong with the government's efforts to avoid overlapping charges and evidence that could raise a claim for double jeopardy. The prosecutors were no doubt aware of the possibility of such a challenge given the fact that Sertich and Allen were involved in each operation.

B.

Sertich also claims he has already been punished for the Indiana conspiracy. He contends his twelve-month prison sentence was based on a Sentencing Guideline computation for tax losses from both the California and the Indiana tax avoidance schemes. It could be true; we are not in a position to know. The presentence report from California indicates Sertich possessed a criminal history category of II. The report also computes a base offense level derived from the tax tables in Section 2T4.1 corresponding to the tax loss. While the report indicates Sertich's plea agreement admitted a $200,000 tax loss, which would result in a base offense level of 14, because no evidence indicated Sertich was liable for more than the

others the probation office recommended adopting a loss of $70,000, the same as attributed to each of Sertich's California codefendants. Section 2T4.1 assigns an offense level of 11 to a $70,000 tax loss. This yields a total offense level of 9 after a two-level reduction for acceptance of responsibility. The resulting sentencing range (with criminal history II) would be 6-12 months. Alternatively, had the court accepted the base offense level derived from the $200,000 tax loss admitted in the plea agreement, it would have arrived at a total offense level of 12 after the acceptance of responsibility deduction. That would yield 12-18 months. Thus, the court might have sentenced Sertich for a $200,000 loss and selected the sentence at the low end of the range, or it may have accepted the probation office recommendation and sentenced Sertich to the high end of the range.

We do not know what the district court in California did. Sertich never raised this argument until his appellate reply brief. As a result, neither the district court in Indiana nor opposing counsel had an opportunity to address the argument, and the record is devoid of the relevant facts, transcripts, or documents to consider the question. Arguments not raised to the district court are forfeited and will only be reviewed for plain error. *United States v. Akinrinade*, 61 F.3d 1279, 1283 (7th Cir.), *cert. denied*, 116 S. Ct. 541 (1995), *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 1776 (1993). We have repeatedly stated that arguments raised on appeal for the first time in a reply brief violate Seventh Circuit Rules. *See, e.g., Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990); Circuit Rule 28(f) (reply brief limited to matters in reply). And we

have repeatedly stated we will not consider such arguments. *Snider v. Consolidation Coal Co.*, 973 F.2d 555, 561 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 981 (1993); *Wilson*, 895 F.2d at 384. The same is true for arguments not fully developed or not supported by pertinent authority. *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) *cert. denied*, 506 U.S. 1083 (1993); Fed.R.App.P. 28(a)(6). Neither case cited by Sertich in his reply brief to support his belated argument is pertinent; each has been explicitly rejected by this circuit. *See United States v. Duarte*, 28 F.3d 47, 48 (7th Cir. 1994), *United States v. Brown*, 31 F.3d 484, 496, n.19 (7th Cir. 1994). While under certain compelling circumstances we will consider issues otherwise forfeited or waived, *see, e.g. United States v. Wilson* 962 F.2d 621, 627 (7th Cir. 1992) (remand of egregious sentencing error compelled despite parties' oversight of issue), this case presents no such compelling circumstance.

Accordingly, the district court's order denying Sertich's Motion to Dismiss for Violation of Double Jeopardy is AFFIRMED.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 30, 1996

Before

Hon. Walter J. Cummings, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

United States of America, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division
No. 95-1471	
v.	No. 93 CR 138
Mark G. Sertich, *Defendant-Appellant.*	**Rudy Lozano**, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Defendant-Appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA HAMMOND DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	NO.
MARK SERTICH,	)	2:93-CR-138-RL
Defendant.	)	

ORDER

(Filed Feb. 09, 1995)

This matter is before the Court on the Motion to Dismiss for Violation of Double Jeopardy filed by the Defendant, Mark Sertich ("Sertich") on July 11, 1994. For the reasons set forth below, Sertich's Motion to Dismiss for Violation of Double Jeopardy is **DENIED**.

BACKGROUND

In October 1991, a federal grand jury in California returned a one count indictment, charging that "[b]eginning on a date unknown to the grand jury and continuing to on or about October 11, 1991, within the Central District of California and elsewhere, Defendants Abram Egyazarov, Eugene Slusker, Mark Sertich, and Samuel Lehtzer, and others both known and unknown to the grand jury" (hereinafter "Egyazarov," "Slusker," "Sertich," and "Lehtzer") conspired to commit federal excise tax evasion in violation of 18 U.S.C. section 371. During

the time frame alleged in the indictment, the Internal Revenue Service ("IRS") required a producer of diesel fuel to pay a federal excise tax of 20.1 cents per gallon of diesel fuel sold. A wholesale distributor became a producer of diesel fuel by obtaining a Registration for Tax Free Transactions, IRS Form 637. Once a wholesale distributor held an IRS form 637, it could sell diesel fuel "tax free" to another wholesale distributor who also held an IRS form 637 and was exempt from paying federal excise tax. However, the first registered wholesale distributor to sell diesel fuel to a company or retailer that was not holding an IRS Form 637 had to pay the 20.1 cents per gallon federal excise tax.

The California indictment alleges that Egyazarov, Slusker, Sertich, and Lehtzer conspired to evade the 20.1 cents per gallon federal excise tax through employment of a daisy chain scheme. Under this type of scheme, a diesel fuel wholesale distributor using a legitimate IRS Form 637 purchases diesel fuel "tax free" from a fuel refinery or wholesale distributor holding an IRS Form 637. This first company then sells the diesel fuel "tax free" to a second company holding a fraudulently obtained IRS Form 637. The second company usually is a shell company which does not take actual possession of the diesel fuel. The second company then "sells" diesel fuel, tax paid, to diesel fuel retailers who do not have IRS Form 637's at a discount price. Moreover, the second company never pays the required federal excise tax. Through this elaborate paper network, the first company avoids its tax liability.

Egyazarov, Slusker, Sertich, and Lehtzer employed this type of scheme by attempting to use a wholesale

distributor, Boland Petroleum, to purchase diesel fuel "tax free" from diesel fuel refineries and then sell it to a shell corporation which would sell the fuel to retailers "tax paid." Specifically, the indictment alleges that Slusker purchased Boland Petroleum. Slusker and Egyazarov then directed a confidential informant to use the prior owner's IRS Form 637 to purchase diesel fuel tax free from diesel fuel refineries and sell it tax paid to diesel fuel retailers. Egyazarov and Slusker also caused the confidential informant to apply to the IRS for a new IRS Form 637. At the same time, Slusker set up a post office box and telephone answering service in the name of a shell company in order to use an IRS Form 637 fraudulently obtained so that Boland Petroleum could sell the diesel fuel tax free, and the shell company would sell it to retailers tax paid.

On December 23, 1991, Sertich pled guilty to the one count of conspiracy to evade federal excise tax in the California indictment. He was later sentenced to twelve months in prison, fined six thousand dollars, and placed on three years probation.

On November 10, 1993, approximately a week before the relevant statute of limitations expired, a federal grand jury returned the indictment at issue in this case, indicating that "[f]rom in or about October, 1986, through on or about November 17, 1987, in the Northern District of Indiana, and elsewhere," Sertich conspired to impede the IRS regarding fuel excise taxes in violation of 18 U.S.C. section 371. The indictment alleges that in April 1987, Sertich met with a co-conspirator about a delinquent debt and discussed how profits could be made from theft and

manipulation of federal and state motor fuel taxes. Specifically, Sertich proposed a product exchange. As president of Kenneth A. White Company d/b/a White Fuels, Inc. ("White Fuels"), Sertich would provide Poly-Fuels, Inc. ("Poly-Fuels") which was owned by the co-conspirator, with gasoline, motor fuel taxes excluded, and Poly-Fuels would supply White Fuels with diesel fuel, motor fuel taxes included. Poly-Fuels was not authorized by the IRS to receive tax free gasoline; thus, Sertich and the co-conspirator agreed that the co-conspirator would pay Sertich five cents more per gallon than the going price in order to receive the tax free gasoline.

With such an agreement in place, the indictment alleges that the following overt acts were committed in furtherance of the conspiracy. Poly-Fuels delivered tanker loads of diesel fuel to White Fuels in Detroit, Michigan and returned to Chicago, Illinois and Northwest Indiana with tanker loads of gasoline from White Fuels. From April 1987 through November 1987, White Fuels sent invoices to Poly-Fuels for the sale of 3,356,404 gallons of gasoline; no federal excise tax was included. During this time frame, however, Poly Fuels actually received only 2,485,148 gallons of gasoline from White Fuels. From July 1987 through October 1987, White Fuels purchased 884,693 gallons of diesel fuel from Poly Fuels, and Poly Fuels invoiced White Fuels for the 15.1 cent per gallon federal excise tax on the sale of the diesel fuels even though White Fuels never paid these taxes. According to the indictment, Sertich wanted the invoice to reflect the payment of taxes so that White Fuels could take a credit on its federal excise tax returns for "paid" taxes. In total, through their actions, Sertich and his co-conspirators

evaded and defeated $346,000 in motor fuel excise taxes on the sale of over 3.3 million gallons of gasoline and diesel fuel.

On July 11, 1994, Sertich brought the current Motion before this Court, alleging that he is being twice prosecuted for the same offense. In particular, he contends that there is actually an over-arching conspiracy to evade federal excise taxes and that the Government has arbitrarily subdivided the conspiracy into two conspiracies in order to appease Indiana and California federal authorities as part of a "turf" war. The Government maintains that two separate conspiracies existed in Indiana and California.

DISCUSSION

Before discussing the relevant standards of proof, this Court believes that it would be useful to present, in detail, the positions of Sertich and the Government as to the dynamics and relatedness (or lack thereof) of the California and Indiana schemes. The basis for Sertich's argument that a single overarching conspiracy existed centers upon a debt which Richard Allen ("Allen"), President of Poly-Fuels, incurred to White Fuels in 1986. Apparently, Sertich, as president of White Fuels, refused to sell Poly-Fuels any more fuel because of this $230,000 debt. (Agent Steve Tinsley Grand Jury Test. p. 10) Allen and Sertich met to discuss the liability and "tried to come up with some way where [Allen] can make some money so he could pay off his $230,000." (Agent Steve Tinsley Grand Jury Test. p. 10) This discussion was the birth of the Indiana tax evasion scheme. According to Sertich,

however, the agreement that Allen and Sertich made was to engage in various business ventures, always evading federal excise taxes in the process, so that Allen could pay off his debt. Thus, by Sertich's account, the primary purpose of the conspiracy at all times was to pay off the debt.

The Government paints an entirely different picture. The Government will readily admit that Allen owed Sertich money. In fact, the Indiana indictment provides that the scheme arose when Sertich met with a co-conspirator (who has been identified as Allen) to discuss a delinquent debt and how profits could be made from theft and manipulation of federal and state motor fuel taxes. Where the Government differs with Sertich is that it contends that the Indiana scheme only lasted until 1987 when White Fuels was closed. According to the Government, the agreement between Sertich and Allen provided that Sertich, Allen, and another co-conspirator would engage in a product exchange, illegally avoiding federal and state motor fuel taxes, in order to make profits. As a side provision to this agreement, Allen was expected to pay off his debt with his portion of the profits. The Government contends that although Allen hoped to pay off his entire debt through this scheme, no agreement existed beyond the confines of the current scheme. Thus, when White Fuels closed in 1987, the conspiracy ended. Then in 1990, Allen contacted Sertich and requested that he work for him in California. According to the Government, a new tax evasion conspiracy arose while Sertich was in California. The Government submits that while these schemes may have had similar motives, to make profits from fuel tax evasion, they were separate, independent

conspiracies which did not overlap in time, places, or execution.

Given this background of the parties' arguments, the Court will now consider the legal standards governing double jeopardy defenses. When asserting a double jeopardy defense, a defendant must make a prima facie, non-frivolous showing that the two indictments cover the same offense, and then the burden shifts to the Government to demonstrate that it has not twice prosecuted the defendant for the same offense. *United States v. Thornton*, 972 F.2d 764, 767 (7th Cir. 1992); *United States v. Dempsey*, 806 F.2d 766, 767 (7th Cir. 1986). Traditionally, to make this showing a defendant was required to meet the "same evidence" test, in essence, to show that the evidence required for one conviction would have been sufficient to support a finding of guilt in the other prosecution. *United States v. Castro*, 629 F.2d 456, 461 (7th Cir. 1980). However, the Seventh Circuit has recognized that this test is inappropriate when the crime involved is conspiracy "because the Government can shape the overt acts charged in each indictment and thus, under the guise of prosecutorial discretion, advance the proposition of one conspiracy's being capable of proof in several prosecutions requiring different evidence for each conviction." *Id.*

Instead, to determine whether a conspiracy has been subdivided arbitrarily, a court should look at both indictments as well as any additional evidence and consider such factors as whether the conspiracies involved the same period, alleged co-conspirators and places, overt acts, and whether the two conspiracies depend on each other for success. *United States v. Dortch*, 5 F.3d 1056, 1061 (7th Cir. 1993); *Castro*, 629 F.2d at 461; *United States v.*

Marable, 578 F.2d 151, 154 (5th Cir. 1978). A court also should consider whether the modus operandi are similar as well as the specific nature of the objectives embodies in each agreement. *Thornton*, 972 F.2d at 767. Finally, a court "cannot ignore case law outside the double jeopardy context that defines the scope of a conspiracy." *Id.* at 769.

To support his position that he has made a prima facie, nonfrivolous showing of double jeopardy, Sertich relies on the following factors. First, both indictments allege that same offense: Violation of 18 U.S.C. section 371. Second, both indictments acknowledge that the conspiracy was broader than charged. In particular, both indictments allege that acts in furtherance of the conspiracy took place in Indiana and elsewhere and in California and elsewhere. Both indictments indicate that other unnamed co-conspirators were part of the conspiracies. Additionally, the California indictment indicates that the conspiracy began on a date unknown. Third, both indictments involve the co-participant, Richard Allen. It is undisputed that the unnamed co-conspirator in the Indiana indictment and the confidential informant in the California indictment is Richard Allen. Fourth, Indiana and California authorities worked together in this investigation. Fifth, both of these conspiracies had the same objective – to evade federal excise taxes.

In response, the Government contends that this information is insufficient to establish a prima facie, nonfrivolous showing of double jeopardy. Conceding that the indictments both charged Sertich with violating 18 U.S.C. section 371 and that there is one unindicted co-conspirator common to both conspiracies, the government still

maintains that the remaining factors of the *Marable* test point to the conclusion that these are two separate conspiracies. The Government asserts that there is no overlap in time, places, or activities between these conspiracies. As to time of events, although the California indictment alleges that the conspiracy began on a date unknown, the Government contends that it is difficult to believe that the conspiracy began as early as 1987 (the end of the Indiana conspiracy) as all of the overt acts named in the indictment refer to events taking place in 1991. As to overlap in places, although the Indiana indictment asserts that acts in furtherance of the conspiracy occurred in Indiana and elsewhere, the Government argues that when the statement is read in context with the rest of the indictment, the "and elsewhere" language is referring to activities occurring in Michigan and Illinois, not California. For instance, in the overt acts section of the indictment, it indicates that in October 1986, Sertich and two co-conspirators met to discuss how the lack of cooperation between Michigan, Indiana, and Illinois regarding fuel purchases resulted in a good setup to avoid payment of fuel excise taxes. Moreover, the indictment discusses the location of fuel shipments in Detroit, Michigan, Chicago, Illinois, and Northwest Indiana. Likewise, none of the overt acts listed in the California indictment indicate that any activity occurred in Indiana. However, the most important consideration, according to the Government, is that the two conspiracies are not identical in execution of activities. The California conspiracy involved a daisy chain scheme in which a shell corporation was used to avoid payment of federal excise taxes. However, the

Indiana conspiracy involved the swap of gasoline for diesel fuel.

Because neither the California indictment nor the Indiana indictment have, at present, resulted in criminal trials, the factual record is limited. Thus, this Court is faced with the somewhat difficult task of trying to piece together the operations of this alleged single conspiracy. However, after considering the parties' arguments as well as the applicable standard, this Court concludes that Sertich has made a prima facie, nonfrivolous showing that the indictments cover the same offense. Admittedly, the Government's position regarding possible overlap in time and places is a conceivable reading of the indictments. However, given the fact that a defendant need only make a prima facie, nonfrivolous showing, this Court believes that the indictment should be read granting all inferences in favor of the defendant's position. Certainly, the possibility that the indictments cover the same time frame and places, standing alone, would not be enough to make a prima facie, nonfrivolous showing. Moreover, the fact that both indictments have one co-conspirator in common, standing alone, is not enough. However, these facts together, coupled with Sertich's explanation of how he and Allen engaged in a pattern of illegal activity so that Allen could repay a debt, helped sway the Court's opinion. The Court is also particularly influenced by the timing of these indictments. Of course, federal authorities from different jurisdictions often work together. However, the fact that the Indiana indictment was returned only one week before the statute of limitations expired when Indiana federal agents were working with California federal agents causes this Court to pause for a

moment. Such timing lends some credence to Sertich's argument that the Government subdivided one conspiracy as part of a "turf" war between federal agents. Given all of the above factors, this Court finds that Sertich has made a prima facie, nonfrivolous showing of double jeopardy.

Thus, the burden now shifts to the Government to demonstrate by a preponderance of the evidence that it is not twice prosecuting Sertich for the same offense. *United States v. Okolie*, 3 F.3d 287, 291 (3d Cir. 1993). The Government indicates that it need not call any witnesses to meet its burden. Instead, the Government has submitted the following evidence to support its position: The Indiana indictment, Exhibit A; the transcript of grand jury testimony of Agent Denita Jackson in the California indictment, Exhibit B; the transcript of Sertich's change of plea hearing in California, Exhibit C; the California indictment, Exhibit D; the California presentence report, Exhibit E; the transcript of grand jury testimony of Agent Steve Tinsley in the Indiana indictment, Exhibit F; and accounting reports, Exhibit G. Basically, the Government's position, through this evidence, is that substantial periods of time existed when Allen and Sertich did not engage in any illegal activity. Moreover, the Government argues that this evidence further shows that there was no overlap in time, places, or activities between the California and Indiana schemes. Thus, two conspiracies existed rather than one overarching conspiracy.

The indictments have already been extensively discussed, and this Court need not rehash the material elicited from the indictments. The transcripts of the grand

jury testimony of the case agents involved in the California and Indiana cases, as well as the transcript of the Sertich's change of plea hearing in California[1], provide additional background to clear up some of the gaps in the indictments. From this evidence, the Court takes note of three particular facts. First, there is no indication from the grand jury testimony of Denita Jackson that any activity during the California scheme occurred in Indiana, and there also is no indication from the grand jury testimony of Agent Steve Tinsley that any activity during the Indiana scheme occurred in California. Thus, there seems to be no commonality in places between the schemes. Second, although a precise starting date of the California scheme is not provided, it is clear that this scheme was developed sometime after Sertich moved to California in 1990 to work at Mark Diamond, Ltd. Thus, there appears to be no overlap in time between these two schemes. Finally, the roles of Allen and Sertich in the two cases is vastly different. Whereas Allen and Sertich were primary organizers in the Indiana scheme, trying to impress co-conspirator Mr. Nardiello with their expertise in fuel tax evasion (Agent Steve Tinsley Grand Jury Test., p. 9), they appear to be secondary players in the California scheme. For instance, in the California scheme, Slusker and Egyazarov appear to be the primary organizers of that scheme. Slusker and Egyazarov forcefully took over Mark Diamond, Ltd. from Allen, who was president of the

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[1] As the Government's proffer of evidence in Sertich's change of plea hearing essentially is based on the information which Agent Denita Jackson testified to before the grand jury, the Court will not discuss in depth the contents of this transcript.

company at the time. (Agent Denita Jackson Grand Jury Test., p. 17) Slusker later approached Allen while he was working somewhere else and asked if Allen would like to assist with the scheme to evade fuel excise taxes by placing Allen as the "front" person for Slusker's new company, Boland Petroleum. (Agent Denita Jackson Grand Jury Test., pp. 17-18) The other defendants in the California scheme repeatedly ordered Allen what to do after this initial meeting. (Agent Denita Jackson Grand Jury Test., pp. 24-25.) Likewise, Sertich appeared to be more of a bookkeeper in the California scheme rather than a primary organizer calling the shots. This scenario does not support Sertich's argument that an overarching conspiracy existed in which he and Allen had an agreement to employ various illicit means to evade federal excise taxes so that Allen could repay the debt be owed. Rather, it suggests that two conspiracies existed: one in which Allen and Sertich were the primary organizers, and another in which Allen and Sertich were either used or coerced into using their illicit business skills to evade federal excise taxes in the fuel industry.

Sertich's California presentence report provides further support that two conspiracies existed as one portion of the report details Sertich's employment history. From 1979 through 1987, Sertich was the president of White Fuels, the company which engaged in the alleged illegal transactions with Poly-Fuels. (California Presentence Report, pp. 18-19) However, from January 1988 until August 1990, Sertich worked in other enterprises where he did not have any apparent contact with Allen. From January 1988 through May 1988 he was employed by Gruber Enterprises located in Troy, Michigan. (California

Presentence Report, pp. 18-19) From January 1989 through July 1989, Sertich owned Tanker Leasing, Inc., located in Romulus, Michigan. (California Presentence Report, pp. 18-19) Then from the spring to August 1990, he was employed by Tiber, Inc., a construction company located in Key West, Florida. (California Presentence Report, pp. 18-19) It was only in August 1990 that Sertich went to work for Allen at Mark Diamond, Ltd. (California Presentence Report, pp. 18-19) Thus, there appears to be over a two-year break in activity in which Allen and Sertich had no business contact, further suggesting that two conspiracies existed in this matter rather than one conspiracy.

Sertich attempts to rebut the Government's evidence by showing that he and Allen had business contacts which extended beyond 1987. To accomplish this purpose, Sertich called as witnesses Richard Allen and Milan Gruber at an evidentiary hearing. Sertich also presented numerous documents as evidence at this hearing.

Allen and Gruber both testified that White Fuels shut down in 1987, and Sertich took his business to Gruber Enterprises. (Allen p. 34; Gruber p. 89) In 1988, Allen had meetings with Sertich about conducting business with Gruber Oil Company. (Allen, p. 34-35; Gerber, p. 89) Part of Allen's testimony suggests that some illegal activity may have been occurring in this endeavor as Allen gave Gruber, owner of Gruber Oil Company, an exemption certificate. In addition, Allen admits that he would fly from California to divide the cash proceeds with Sertich and Gruber. (Allen, p. 37) The Court concedes that such action seems somewhat suspicious for legitimate business purposes; however, it is difficult to determine from the

testimony of Allen and Gruber whether any tax was due as there seemed to be conflicting testimony regarding whether the fuel involved was heating oil, which would not be taxed, or motor fuel, which would be taxed. (Gruber, pp. 100-03)

In any event, in late 1988-89, Sertich introduced Allen to Mr. Turner, who worked for Clark Oil Company, and Mr. Turner and Allen had discussions about processing crude oil. (Allen, p. 39) Allen contends that Sertich was not involved with this deal; Allen was to merely pay off his debt to Sertich with any profits he made from the deal. (Allen pp. 39, 46)

During the evidentiary hearing, Allen also made some off-handed remarks that he often discussed avoiding payment of taxes in his various business deals. (Allen, pp. 51, 64-65) In fact, at one point Sertich's counsel had Allen read a portion of a December 20, 1988, letter[2]

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[2] In total, the body of the December 20, 1988, letter reads as follows:

> After reviewing the above captioned letter I have spoken with Mr. Sertich and told him that I would not respond to your letter at this time, however I have decided differently.
>
> As I related to Mr. Sertich that the christmas holidays were upon us and therefore nothing much would be accomplished that I would wait until after the holidays before making any decision as to wether [sic] I want to start a new entity. Also, there is a status conference regarding the lawsuit and I want to wait until a determination is made wether [sic] the plaintiff is going to settle or do battle in court. That

written by Allen to David H. Miller, Sertich's attorney at the time. The following testimony arises from that reading:

> A. It says, in closing let me say that I certainly would like to keep the door open for further dialogue in some sort of joint venture effort with Mr. Sertich.
>
> Q. And that's a true statement, is it not?
>
> A. Sure.
>
> Q. And you all attempted other joint ventures together?
>
> A. Sure.

> decision certainly weighs heavy as to my future plans business wise.
>
> On [sic] other thing, your reference as to yet unspecified distribution of anticipated profits I want you to know that I have asked Mr. Sertich on several occasions how he would like to divide the spoils. I get answers like, "I'm not greedy", "there's plenty of time for that" and "lets get the paper work then we'll talk.["]
>
> As you know that makes it very difficult to figure out any kind of plan in advance when you are dealing with an unknown of that magnitude.
>
> In closing let me say that I certainly would like to keep the door open for further dialogue in some sort of joint venture effort with Mr. Sertich.

Certainly, portions of this letter seem suspicious and might support an inference of illegal activity. However, one would hope that an attorney would not support such activity; thus, this Court questions whether this letter is referencing the prospect of illicit future ventures with Sertich.

Q. And if part of that was joint ventures was to evade excise taxes so you both could make some money?

A. Yes.

(Allen, p. 70) Such comments seem to support Sertich's argument that he and Allen engaged in a pattern of illegal activity in order for Allen to repay his debt. However, on cross-examination, Allen unequivocally indicated that he had no joint ventures with Sertich in 1988 through late 1990. (Allen, p. 73)

The Court fails to see how Sertich's evidence rebuts the Government's showing that there was a substantial break in activity between Sertich and Allen. Even if this Court were to assume for a moment that the conspiracy between Allen and Sertich continued while Sertich was working at Gruber Oil Company (although this assumption may be somewhat suspect as there is no concrete evidence indicating that Allen, Sertich, and Gruber evaded fuel excise taxes), there still exists a two-year gap in which Sertich and Allen did not have contact. In addition, the fact that Sertich introduced Allen to an individual at Clark Oil Company in late 1988-early 1989 fails to establish any link in furtherance of an overarching conspiracy.

Moreover, the documents presented as evidence at the hearing failed to bridge this gap. The documents which Sertich presented as evidence included exemption certificates, correspondence by Allen to various individuals at other fuel companies, and documents pertaining to a January 1988 promissory note of over $240,000 from Poly-Fuels to While Fuels. For the most part, the Court

fails to see the relevance of these documents. The correspondence to individuals at other fuel companies indicates that Allen did business with other fuel wholesalers, haulers, and refineries, but there is no evidence of a connection between Allen, Sertich, and these other entities. Moreover, the documents pertaining to the promissory note fail to demonstrate that Allen used anything other than legitimate means to pay this note. Finally, the Court has only been provided with exemption certificates up to 1988, so there continues to be a two year gap in activity.

Ultimately, this case comes down to one simple question: Did Allen and Sertich make a single agreement to engage in a pattern of tax evasion so that Allen could pay back a debt to Sertich? While Sertich presented sufficient evidence to meet a prima facie, nonfrivolous standard, the Government has clearly shown by a preponderance of the evidence that two separate agreements existed as there was a substantial gap in time between the schemes, the overt acts of the schemes occurred in different places, and the methods and interactions of the coconspirators were different in both schemes. Moreover, after reviewing all the evidence presented, this Court does not believe that Sertich has rebutted the Government's showing. Accordingly, this Court will not dismiss the indictment on the basis of double jeopardy.

CONCLUSION

For the reasons set forth above, Sertich's Motion to Dismiss for Violation of Double Jeopardy is **DENIED**. Trial is to proceed as previously scheduled.

ENTER: 2/9/95

/s/ Rudy Lozano
RUDY LOZANO, Judge
United States District Court